No. 14,190

IN THE

United States Court of Appeals

For the Ninth Circuit

SUPERIOR SAND AND GRAVEL MINING CO., INC., a corporation, *Appellant,*

vs.

TERRITORY OF ALASKA, *Appellee,*

and

VERNON C. SCHUBERT, DOROTHY SCHUBERT, CLARENCE D. SMITH, JR., LILLIAN E. SMITH, EUGENE E. SAXTON, DOROTHY M. SAXTON, ELLSWORTH E. SAXTON and GRACE D. SAXTON, Co-Partners Doing Business as the NORTHERN CONSTRUCTION ASSOCIATION, and ELLSWORTH E. SAXTON, as Agent for Said Association, *Appellants,*

vs.

TERRITORY OF ALASKA, *Appellee.*

Appeal from the District Court of the Territory of Alaska, Third Division.

BRIEF OF APPELLANT, SUPERIOR SAND AND GRAVEL MINING CO., INC., A CORPORATION.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF OF APPELLANT, SUPERIOR SAND AND GRAVEL MINING CO., INC., A CORPORATION.

STATEMENT OF THE CASE.

The land involved is Section 16, Township 13 North, Range 3 West, Seward Meridian, Anchorage Precinct, Third Judicial Division, Territory of Alaska. It contains valuable deposits of sand and gravel (R. 33).

The Act of March 4, 1915, 38 Stat. 1214, 48 U.S.C.A. Section 353, reserved Sections 16 and 36 in each township in Alaska, not known to be mineral in character at the time of survey, from sale or settlement for the support of the schools, and gave the Territory of Alaska the right to lease such sections.

The Act of August 7, 1939, 53 Stat. 1243, amended the 1915 Act to authorize, among other things, the disposition of school sections under the mining and mineral leasing laws of the United States, upon conditions enumerated in the statute.

Late in 1950, the predecessors of Superior Sand and Gravel Mining Company, Inc., appellant (R. 9) and Schubert, *et al.,* appellants (R. 5 and R. 14), and Anchorage Sand and Gravel Company, Inc., (R. 4) located placer mining claims on this school section. At that time, the section was under lease to others (R. 53) by the Territory of Alaska. Also, early in 1950, Anchorage Sand and Gravel Company, Inc., contracted with the United States for the removal of gravel from a portion of the section, under the Materials Act (Act of July 31, 1947, 61 Stat. 681, 43 U.S.C.A. Sec. 1185, *et seq.*) (R. 4).

In 1952, appellants Schubert, *et al.,* applied for patent under the placer mining laws (R. 6 and R. 15).

Superior Sand and Gravel Mining Co., Inc., appellant (R. 16), and Anchorage Sand and Gravel Company, Inc., (R. 6), filed adverse claims in the Land Office and commenced these proceedings (R. 3 and R. 8), under 30 U.S.C.A. Section 30 and 48 U.S.C.A. Section 386, to determine the rights of the adverse mineral claimants. The Territory of Alaska, appellee, named defendant in each of the actions, moved to consolidate the actions (R. 27). This motion was granted (R. 30). The Territory of Alaska also moved to dismiss the complaints (R. 29). After argument, the trial Court entered its opinion (R. 32), and its order (R. 40), dismissing the complaints with prejudice. This appeal followed.

SPECIFICATION OF ERRORS.

The Court erred as a matter of law in dismissing the complaints because:

1. The determination of the mineral or non-mineral character of the land is solely for the determination of the Land Department of the United States, and not for the Court.

2. Sand and gravel were minerals subject to location under the mining laws of the United States in 1950 (R. 36).

3. School lands in Alaska were subject to disposition under the mining laws of the United States during 1950.

4. The Materials Act did not prevent mining locations for sand and gravel in 1950 (R. 37).

Specification of errors Nos. 1 and 3, although extensively argued orally and by written briefs, were disposed of by the Court as follows (R. 38):

> "The questions argued on behalf of Northern Construction Association and the Superior Sand and Gravel Mining Co., Inc., in opposition to the motion to dismiss, are either not presented by the record or are not involved and, hence, do not merit extended discussion."

JURISDICTION.

Jurisdiction of the District Court is conferred by Title 48, U. S. Code, Section 101. Procedure in the District Court since July 18, 1949, has been controlled by the Federal Rules of Civil Procedure; extended to the Courts of the Territory of Alaska on that date.

Jurisdiction of this Court to review the judgment of the District Court is conferred by New Title 28, United States Code, Sections 1291 and 1294 and the appeal is governed by the Federal Rules of Civil Procedure.

ARGUMENTS AND AUTHORITIES.

FIRST ARGUMENT.

The Court erred as a matter of law in dismissing the complaint because:

1. The determination of the mineral or non-mineral character of the land is solely for the determination of the Land Department of the United States, and not for the Court.

It has been consistently held for many years that the decision as to the mineral or non-mineral character of land is for the Land Department and not for the Courts:

In the case of *Burfenning v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.* (1896), 163 U.S. 321, 323, it is stated:

> "It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, mineral land or not, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be reexamined. Johnson v. Towsley, 13 Wall. 72; Smelting Company v. Kemp, 104 U.S. 636; Steel v. Smelting Company, 106 U.S. 447; Wright v. Roseberry, 121 U.S. 488; Heath v. Wallace, 138 U.S. 573; McCormick v. Hayes, 159 U.S. 332."

In the case of *Cosmos Exploration Company v. Gray Eagle Oil Company* (1903), 190 U.S. 301, it was held that the Land Department has the statutory right to make rules and regulations, and that the Courts will take judicial knowledge of such rules and regulations as shall be made by it regarding the sale or exchange of public lands. It was further held at page 314:

> "What may be the decision of the Land Department upon these questions in this case, cannot be known, but until the various questions of law and fact have been determined by that Department in favor of complainant it cannot be said that it has a complete equitable title to the land selected. '* * * The Government has provided a special tribunal for the decision of such a question arising out of the administration of public land laws, and that jurisdiction cannot be taken away from it by the Courts. U.S. v. Schurz, 102 U.S. 378, 395.'
>
> * * * that the courts have no jurisdiction to determine questions of fact with reference to the public lands while the claims of the respective parties are pending before the Land Department is axiomatic * * * When, therefore, the jurisdiction of the Land Department is once set in motion, and that tribunal is engaged in the investigation which necessarily involves a determination of the character of the land, and which determination would be conclusive, the courts are precluded from trying or determining the question."
>
> *Lindley, Mines,* Vol. 1, Section 108, page 188-9.

Thus, Congress has in effect designated the Land Department as a "legislative" Court:

> "* * * the Congress, in exercising the powers confided to it, may establish 'legislative' courts (as distinguished from 'constitutional courts in which the judicial power conferred by the constitution can be deposited') which are to form a part of the government of the territories or of the District of Columbia, or to serve as special tribunals 'to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it'. But 'the mode of determining matters of this class is completely within Congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals * * * Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the Congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans."
>
> *Crowell v. Benson,* 285 U.S. 22, 50.

This does not leave the Territory of Alaska without a tribunal in which it can be heard. 43 C.F.R. Section 221.1 permits contests or protests to be initiated by any person claiming an interest in the land; Sections 185.89 to 185.92 provide the procedures for protests and contests; 30 U.S.C.A. Section 40 provides the

manner of taking testimony and proofs relating to contests as to the mineral or agricultural character of land.

SECOND ARGUMENT.

The Court erred as a matter of law in dismissing the complaints because:

2. Sand and gravel were minerals subject to location under the mining laws of the United States in 1950 (R. 36).

As late as 1942, in *United States v. Barngrover,* 57 Land Decisions 533, the Land Department had followed the rule that "any substance found in nature, having sufficient value, separated from its situs as part of the earth, to be mined, quarried, or dug for its own sake or its own specific uses is locatable and enterable under the mining laws." In *Layman v. Ellis,* 52 L.D. 714, decided in 1929, the Land Department expressly repudiated the rule that gravel, since it has not been classified as a mineral by standard authorities, was not to be considered a valuable mineral deposit under the mining laws. The *Ellis* case expressly overruled *Zimmerman v. Brunson,* 39 L.D. 310, decided in 1910. In the *Ellis* case an extended discussion of the value of gravel for its use in the mechanical arts occurs along with a discussion of its unique physical characteristics, which make gravel distinguishable from other rock and impart to it its value in the natural state. These distinguishing

physical characteristics, even though gravel has no definite chemical composition, entitle it to be classified as a mineral when they give to gravel its commercial value. The *Ellis* case took pains to point out that in the *Zimmerman* case the reasons relied on for not including gravel within the term mineral, as defined in 1 *Lindley on Mines* 163, 3rd Ed., and *Pacific Coast Marble Co. v. Northern Pacific R. R. Co. et al.,* 25 L.D. 233, were unsubstantial, and that the *Zimmerman* case had been criticized by leading text writers on the subject. In *Taking of Sand and Gravel from Public Lands* case, 54 L.D. 294, decided in 1933, the *Ellis* case was reaffirmed as to the taking of sand and gravel from public domain land under a placer mining claim.

In *United States v. Aitken* (1913), 25 Philippine 7, the question of whether commercial gravel suitable for building and construction material was locatable under the placer mining laws of the Philippines is discussed at length commencing on page 12. The Act of Congress dated July 1, 1902, was the statutory mining law involved in this case. Section 20 therein, except for its limited application to public lands in the Philippine Islands, is the exact counterpart of 30 U.S.C.A. 21. Section 21 of the Act of Congress dated July 1, 1902 is the counterpart of 30 U.S.C.A. 22, but with some differences in wording due to the place of application in each instance. These differences do not seem to materially change the legislative intent in each instance, so that the Philippine Court's de-

termination has application to the United States mining laws on this question.

The determination that commercial gravel is not a mineral or a building stone subject to location under the placer mining laws based on these four grounds:

1. That commercial gravel is not included in the "Scientific" definition of mineral.

2. That it is not included in the "Legal" definition of mineral.

3. That "on the broad grounds of public policy" it would be unwise for the Government to divest itself of the ownership of road building materials in the face of its obligation to use them in the exercise of one of its most important functions.

4. A rule of statutory interpretation of the mining laws which states that "Where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, that construction should be adopted which will support the claim of the Government rather than the claim of the individual."

At page 15 in the *Aitken* case the Philippine Court states that the scientific definition of the term minerals is narrower than the legal definition and that they do not rely on the scientific definition in reaching their decision. Other Courts had already held that substances such as coal, asphalt, phosphate rock etc., having no definite chemical composition and being

of organic origin are within the legal definition of minerals.

In concluding that commercial gravel is not a mineral or a building stone within the mining laws, the Court relied heavily upon the Land Department decision of *Zimmerman v. Brunson,* 39 L.D. 310 (1910) cited at page 18. The case of *Layman v. Ellis,* discussed supra, overrruled the *Zimmerman* case both as to result and the underlying theory. Land Department decisions thus no longer sustain the *Aitken* case on the second ground relied upon.

In its discussion pertaining to public policy, the Philippine Court attempts to buttress its legal position by invading the province of Congress. Congress must appropriate money for roads. Since it has not excluded gravel from the operation of the mining laws, as it could have done in reliance upon these same public policy grounds, the inference is clear that it did not wish to do so. This is especially evident upon a consideration of 54 L.D. 294 (1933) which involved the taking of gravel from public domain lands by state, county, and mineral entrymen, for road building purposes. The discussion at page 296 of 54 L.D. is particularly pertinent to statements on page 21 in the *Aitken* case, regarding speculation in gravel lands to the detriment of the exercise of the road building function of the Government. The Land Department in 54 L.D. 294 disposes of the public policy grounds relied on in the *Aitken* case.

The rule of statutory interpretation relied on in the *Aitken* case is limited, by its own terms, to contests between a claimant and the Government. To the extent that its decision is based on this ground, the *Aitken* case is distinguishable on its facts, from cases between adverse private claimants between themselves, and as against the Territory of Alaska under 38 Statutes 1214. In the instant case, the Territory of Alaska cannot claim to come within this rule of statutory interpretation cited in the *Aitken* case.

After a consideration of the bases of its decision, the *Aitken* case does not appear to be a well reasoned opinion to support the proposition that commercial gravel is not locatable under the mining laws and that it is not a valuable mineral deposit under the mining laws.

Various other non-metallic substances have been held to be subject to entry under the placer mining laws. They include:

Guano:

Richter v. Utah, 27 L.D. 95.

Building stone:

Pacific Coast Marble Co. v. N.P.R.R. Co., 25 L.D. 233;

Forsythe v. Weingart, 27 L.D. 680.

Limestone:

Morrill v. Northern Pacific R. R. Co. et al., 30 L.D. 475.

(Limestone valuable for purpose of manufacture is a mineral within the mining laws:

Dunbar Lime Co. v. Utah-Idaho Sugar Co., 17 Fed. 2d 351 (1926), at p. 355.)

Sandstone:

Beaudette v. N.P.R.R. Co., 29 L.D. 248.

Slate and Marble:

Schrimpf v. N.P.R.R. Co., 29 L.D. 327.

Granite:

Northern Pacific Railroad Co. v. Soderberg, 188 U.S. 526.

Sand and Gravel in place:

Cline v. Henry et al., 239 S.W. 2d 205 (1951), at p. 209.

Bentonite:

149 P. 2d 142 (1944), at p. 145, 146.

Whetstone:

85 Fed. Supp. 157 (1949), at p. 162.

Stone quarried:

93 N.E. 2d 500 (1950), p. 503.

In all these cases, the test used to determine whether the lands are enterable under the placer mining laws was their value for the deposits as against the use of the land for agriculture.

"Mining" as used in the Bankruptcy Act includes quarrying or open workings. *Burdick v. Dillon,* 144 Fed. Rep. 737 (1906), at p. 741. Stripping for limestone is mining under the Internal Revenue Code.

Arrel et al. v. Collector, 52 Fed. Supp. 635 (1935), at p. 636.

The leading judicial decisions favorable to the inclusion of gravel as a valuable mineral deposit are:

Loney v. Scott (1910), 112 Pac. 172;

Northern Pacific Railroad Co. v. Soderberg (1903), 188 U.S. 526, and

Webb v. American Asphaltum Co. (1907), 157 Fed. 203.

In *Loney v. Scott,* building sand was held to be mineral within the meaning of United States mining statutes and subject to entry under placer claims. This decision was based on the profitable market for building sand as used in the mechanical arts.

In the *Webb* case, the Court stated at p. 204 that a placer claim is a claim of a tract of land for the sake of loose deposits on or near its surface in contrast to lode claims where the valuable deposits are in lodes or veins in rock in place. In *Reynolds v. Iron Silver Mining Co.,* 116 U.S. 687 (1886), at p. 695, the Court speaks of differing methods of obtaining deposits from lode and placer mining claims. In the latter, "the usual way is to take the soft earthy matter in which the particles of mineral are loosely mingled, and by filtration separate the one from the other." In the case of deposits found in lodes, "following this vein into its stony case in the bowels of the earth, detaching and bringing it to the surface and subjecting it to crushing, melting and other processes

by which the precious metal is separated from the ore of which it is a part." 1 *Lindley on Mines,* 90, 3d Ed., refers to *Bainbridge on Mines,* 5th Ed. 4, wherein it is stated that "minerals are not the less minerals because they are gotten by quarrying as distinguished from mining." Thus, Congressional intent as to what are minerals is not limited to those which must be removed by extraction and mining. Placer claims, by definition, may be susceptible to easy removal as a part of the earth near or upon the surface. See also: *Clipper Mining Co. v. Eli Mining and Land Co.* (1904), 194 U.S. 220, at p. 228.

Since the mining law distinguishes between lode or vein and placer claims, the word "discovery" as used in 30 U.S.C.A. 23 must be construed in its context, wherein it refers to veins or lodes. "Discovery", as used in 30 U.S.C.A. 23, does not necessarily apply to placer locations.

In the light of the decided cases discussed and the statutes construed the conclusion is inescapable that the Land Department's rule since *Layman v. Ellis* in 1929, should be followed here. *Loney v. Scott* is ample judicial authority for this jurisdiction, particularly in view of the settled rule of the Land Department adjudications. The *Aitken* case was tolerable to the extent of its reliance upon *Zimmerman v. Bronson.* In view of the express repudiation of the rule therein by *Layman v. Ellis,* the *Aitken* case should have no effect as a precedent in the instant case.

THIRD ARGUMENT.

The Court erred as a matter of law in dismissing the complaints because:

3. School lands in Alaska were subject to disposition under the mining laws of the United States during 1950.

38 Stat. 1214, March 4, 1915, provides for the reservation from sale or settlement for the support of the common schools in the Territory of Alaska sections numbered 16 and 36 in every township, when the public lands of the Territory are surveyed under direction of the United States Government. There is a proviso that the reserve is not applicable to known mineral lands in the numbered sections at the date of the acceptance of survey, and that the proceeds received by the United States from mineral lands in the numbered sections are to inure to the benefit of the public schools of Alaska. The first proviso allows the Territory the selection in lieu of indemnity lands, should the numbered sections specified be fractional or otherwise appropriated under or by any Act of Congress before the survey.

53 Stat. 1243, August 7, 1939, added to 38 Stat. 1214, providing, among other things, that "such (the reserved) lands and the minerals therein shall be subject to disposition under the mining and mineral leasing laws of the United States * * *" Further, that "any leases issued by the Territory after a valid appropriation of such reserved lands under the mining laws or the mineral leasing laws of the United States

shall be with due regard to the rights of the mineral claimant."

Reading these two statutes together, it seems clear that (1) known mineral lands at time of survey are excepted from the reservation and (2) that subsequently discovered minerals on reserved lands are locatable under the mining laws upon conditions providing for compensation to any Territorial lessee for damages to his leasehold.

53 Stat. 1243 was repealed by Act, March 5, 1952, but this is not material to a discussion of rights existing in November, 1950. In the light of the *Sweet* case, discussed infra, the present form of 48 U.S.C.A. 353 still does not seem to evidence Congressional intent to reserve mineral lands to the Territory.

U. S. v. Sweet (1918), 245 U.S. 563, construes section 6 of the Utah Enabling Act, 28 Stat. 107, granting numbered sections to that State upon its admission for support of common schools. The grant does not expressly include or exclude mineral lands. Here, lands known to be valuable for coal before Utah became a state were involved. A closely related section of the same enabling Act states "* * * and such land (the numbered sections granted) shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be conveyed for school purposes only." Despite the strong language of this Act, which taken alone evinces an intent to make a complete grant to the State, the Court says,

at p. 566, that the ultimate question for decision is whether the school land grant to Utah embraces mineral land. In answering this question in the negative, the Court says that this Act must be read in the light of other statutes and a settled public policy in respect to mineral lands (p. 567). After discussing *Mining Co. v. Consolidated Mining Co.,* 102 U.S. 167, which construed the school land grants to California as not intending to convey mineral lands, and 26 Stat. 796, defining the indemnity or lieu lands to which a State or Territory is entitled in respect of its school grants, should the numbered sections prove to be mineral, the Court says at p. 572 "that the school grant to Utah must be read in the light of the mining laws, the school land indemnity law, and the settled public policy respecting mineral lands, and not as though it constituted the sole evidence of the legislative will." When so read, the Court says that it does not disclose a purpose to include mineral lands and that the long prevailing policy of Congress is to dispose of mineral lands only under laws specially including them. *Work v. Braffet* (1927), 19 Fed. 2d 666, refers to the *Sweet* case and follows the rule as settled law.

44 Stat. 1026, 43 U.S.C.A. 870 (1927), extends the school grants to the several states to embrace numbered mineral sections, thus reversing the *Sweet* case doctrine and giving a clear expression of the intent of Congress on the matter. However, 870 (c) excludes all lands in the Territory of Alaska from the provisions of 43 U.S.C.A. 870.

In the light of Congressional intent, as evidenced by 53 Stat. 1243 and 44 Stat. 1026, it seems clear that mineral lands in numbered school sections reserved from sale or settlement are locatable under the United States mining laws, even though they were not known to be mineral in character at the time of survey. 38 Stat. 1214 is not a "grant" of lands to the Territory, as was Section 6 of the Utah Enabling Act, but merely reserves certain lands from sale or settlement. It does not reserve known mineral lands. 53 Stat. 1243 allows reserved lands which are mineral in character to be subject to disposition under the mining laws. The indemnity provisions of 38 Stat. 1214 give force to the view that Congress intends to dispose of mineral lands only under laws specifically doing so, and that they are not included in school land grants, much less reservations from sale or settlement. The *Sweet* case doctrine still controls mineral school lands in Alaska. What was given the Territory of Alaska by 38 Stat. 1214 is less than that given by Section 6 of the Utah Enabling Act. No present or future grant of lands to the Territory is made, but a trust is imposed in favor of the Territory on the proceeds of the reserved lands.

FOURTH ARGUMENT.

The Court erred as a matter of law in dismissing the complaints because:

4. The Materials Act did not prevent mining locations for sand and gravel in 1950 (R. 37).

The Act of July 31, 1947, c. 406, Section 1, 61 Stat. 681, 43 U.S.C.A. Section 1185:

> "The Secretary of the Interior, under such rules and regulations as he may prescribe, may dispose of materials including but not limited to sand, stone, gravel, yucca, manzanita, mesquite, cactus, common clay, and timber or other forest products, on public lands of the United States if the disposal of such material (1) is not otherwise expressly authorized by law, including the United States mining laws, (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such materials may be disposed of only in accordance with the provisions of Sections 1185-1187 of this title and upon the payment of adequate compensation therefor * * *"

This Act also provides that the proceeds of the sale of materials on Alaska school lands shall be paid to the Territory of Alaska for school purposes. The District Court in its opinion (R. 37) considers this Act as a close analogy to the Mineral Lands Leasing Act (coal, oil, gas, phosphates, etc.) and therefore decided that sand and gravel could only be disposed of under the Materials Act and not under the general mining laws of the United States.

Appellants contend that the Materials Act does not restrict or modify the general mining laws, but rather supplements those laws by adding an alternative method of disposal. For example, the opinion of the trial Court would repeal the provisions of 30 U.S.C.A.

Section 161 extending the general placer mining laws to building stone. Implied repeals are not favored and will not be adopted unless conditions so require. The Materials Act refers only to the disposal of the materials and not to the purchase of the lands containing the materials, while the mining laws (See 30 U.S.C.A. Section 22) permit the occupation and purchase of the lands themselves, as well as the right to extract the minerals. The term "mineral" in the general mining laws has been interpreted to mean a variety of items; the word "materials" in the Materials Act would cover an even greater variety, as is evidenced by the specific inclusion of four items of vegetation (yucca, manzanita, mesquite, and cactus). To hold that the Materials Act provides an exclusive procedure could well mean the repeal of all prior mining laws, including the Mineral Lands Leasing Act, for all minerals are materials, but materials are not necessarily minerals. There is no point of compromise; either the Materials Act supersedes the mining laws or it supplements them; there is no criterion in the Act for determining that it supersedes the mining laws as to some items (for instance stone which is specifically mentioned) but not as to others.

Further, the Materials Act alone cannot be considered as constituting the sole evidence of the legislative will, but must be read in connection with the mining laws, the Mineral Lands Leasing Act, the Building Stone Act, and all other relevant provisions of the statutes, and the settled public policy respect-

ing mineral lands. On such a basis, it could not be considered that Congress or the Department of the Interior intended that the Materials Act should supersede the mining laws. If Congress had so intended, it would not have been necessary in 1952 to repeal the 1939 Act permitting mining locations on Alaska school lands—keeping in mind that the mining claims of appellants were the moving cause of the 1952 Act and that the legislative history of the 1952 Act recognizes the validity of the mining locations of appellants.

Finally, it is of special note that the operation of the Materials Act is permissive and therefore cannot be construed as conclusive.

FIFTH ARGUMENT.

CONCLUSION.

The first and most important point raised by appellants is that the determination of the mineral or non-mineral character of the land is solely for the determination of the Land Department of the United States, and not for the Court.

This is a special statutory proceeding designed to serve a specific purpose (30 U.S.C.A. Sections 29 and 30). The statute does not state or imply that the trial Court may usurp the authority of the Land Department for the determination of questions of fact which are solely within the jurisdiction of that Department. A ruling by this Court that sand and gravel are not

minerals within the meaning of the placer mining laws would be an unauthorized assumption of the jurisdiction of the Land Department.

The Territory of Alaska attempted, by its motion to dismiss, to do indirectly that which it cannot do directly. The Territory knows that it would be next to impossible to induce the Land Department to overrule its holding of many years standing to the effect that sand and gravel are minerals within the mining laws. Such a ruling was made by the Land Department as a general rule to apply to all the States and Territories, and the Department undoubtedly would not upset such a ruling merely because the public interest of the schools of the Territory of Alaska might be best served in this one instance by so doing. The Territory felt that the trial Court might be swayed to overlook the far reaching nation-wide importance of overruling the established policies of land disposal and thus make a decision favorable to the Territorial position because of local importance and local sentiment. This is certainly the exact circumstance that Congress was attempting to prevent when it clothed the Land Department with nation-wide authority to decide the character of land under general rules and regulations.

A decision by this Court as to the character of the land would invalidate the entire procedural safeguards established by the Land Department for the determination of this question. It would, in effect, repeal the regulatory and rule making powers of the

Land Department as to public lands and throw every protest or contest, as well as adverse claims, into the Courts.

The mineral claimants, being all parties other than the Territory, must have a decision on the status of their respective possessory rights as between themselves before they can return to the Land Office and complete the necessary steps to perfect their claims and secure patents, if they are entitled to patents. Affirmance by this Court of the order of the trial Court would forever bar them from such further proceedings. However, the reversal by this Court of the order of the trial Court would in no wise bar the Territory from contesting or protesting the mineral character of the land or even the right of the mineral claimants to locate mineral claims of any description on the lands involved; the Territory can do so before the Land Department at any time prior to the issuance of patent (43 C.F.R. 185.89).

A determination of this first point in favor of appellants disposes of the entire appeal for the same reasoning applies to the other three points. Every point in this appeal should be decided by the Land Department under its exclusive jurisdiction in the disposal of public lands and not by the Court.

If this Court should decide adversely to appellants, then it should consider the remaining points:

2. Sand and gravel were minerals subject to location under the mining laws of the United States in 1950 (R. 36).

3. School lands in Alaska were subject to disposition under the mining laws of the United States during 1950.

4. The Materials Act did not prevent mining locations for sand and gravel in 1950 (R. 37).

It is respectfully submitted that the judgment dismissing the complaints in this cause be reversed and that the Court determine that gravel is a valuable mineral deposit under the mining laws of the United States and that school lands in Alaska are subject to disposition under the mining laws of the United States and were so subject during the year 1950.

Dated, Anchorage, Alaska,
May 28, 1954.

Respectfully submitted,
JOHN E. MANDERS,
Attorney for Appellant, Superior Sand and Gravel Mining Co., Inc., a corporation.